

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID MICHAEL BICKHAM,

Defendant-Appellant.

UNPUBLISHED

February 9, 2010

No. 291802

Arenac Circuit Court

LC No. 08-003352-FC

Before: K. F. Kelly, P.J., and Hoekstra and Whitbeck, JJ.

PER CURIAM.

Defendant, David Bickham, appeals by delayed leave granted from the sentence of life imprisonment the trial court imposed on his conviction of criminal sexual conduct in the first degree (CSC I).¹ We affirm the trial court's scoring of offense variables (OV) 8 and 10, but we vacate that sentence and remand this case to the trial court for articulation of the reasons for its sentencing departure. We decide this appeal without oral argument.²

I. Basic Facts And Procedural History

Bickham admitted in court that he had, on two separate occasions, had sexual intercourse with his step-daughter, then 13 years old, in the girl's bedroom. Bickham had earlier told the police that such activity had been going on for seven months, and the victim had likewise reported having sex with Bickham, almost daily, in her bedroom, for that period.

As part of an agreement, Bickham pleaded guilty to one count of CSC I and one count of attempted criminal sexual conduct in the third degree.³ In addition to the life sentence for the CSC I conviction, the trial court imposed a concurrent sentence of 40 to 60 months' imprisonment for the attempt conviction.

¹ MCL 750.520b(1)(b).

² MCR 7.214(E).

³ MCL 750.520d(1)(a) and MCL 750.92(2).

II. Sentence Scoring

A. Standard Of Review

Bickham argues that the trial court erred in its scoring, over objection, of OVs 8 and 10 under the sentencing guidelines and in imposing a minimum sentence for CSC I beyond the range recommended by the guidelines. The proper application of the statutory sentencing guidelines presents a question of law that this Court reviews de novo.⁴ And this Court will uphold the trial court's scoring of the guidelines if there is any evidence to support it.⁵

B. OV 10

The trial court assessed Bickham 15 points for OV 10, which concerns victim vulnerability. This is the point total prescribed where the offender engaged in predatory conduct,⁶ which is defined as “preoffense conduct directed at a victim for the primary purpose of victimization.”⁷ During sentencing, Bickham's counsel argued that Bickham should have received no more than 10 points, which is the proper score where the offender simply exploited a victim's youth or other special vulnerability.⁸ On appeal, Bickham argues that he should have received zero points. However, we agree with the prosecution that the score of 15 points was proper based on the record evidence.

Here, both the victim and Bickham admitted to numerous sexual assaults going on for a very long time before disclosure. Bickham specifically facilitated these encounters by picking up the victim from school while leaving her brother at school to wait to take the bus, thus allowing himself time to be at home alone with the girl. Moreover, Bickham provided the victim with marijuana and bought condoms to use while having sex with the girl. Accordingly, there was evidence that Bickham engaged in preoffense conduct.⁹ Further, Bickham engaged in grooming behavior of the victim, his step-daughter, who, given her tender age and Bickham's authority over her as a stepparent, had a readily apparent susceptibility to injury and persuasion.¹⁰ And, finally, Bickham engaged in this preoffense conduct for the primary purpose

⁴ *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001).

⁵ *People v Phillips*, 251 Mich App 100, 108; 649 NW2d 407 (2002); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

⁶ MCL 777.40(1)(a).

⁷ MCL 777.40(3)(a).

⁸ MCL 777.40(1)(b).

⁹ *People v Cannon*, 481 Mich 152, 162; 749 NW2d 257 (2008); *People v Steele*, 283 Mich App 472, 491; 769 NW2d 256 (2009).

¹⁰ *Cannon*, 481 Mich at 162; *Steele*, 283 Mich App at 491-492.

of victimizing his stepdaughter.¹¹ Therefore, we affirm the trial court's scoring of 15 points on OV 10.

C. OV 8

The trial court also assessed Bickham 15 points for OV 8, which concerns asportation or captivity of the victim. This is the point total prescribed where the victim was "asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense."¹² The sentencing guidelines do not define "asportation."¹³ "But it does not require the use of force."¹⁴ Further, as the trial court correctly held, scoring this variable does not require that the victim have been moved any great distance. Thus, we conclude that although the sex between Bickham and his step-daughter was consensual and took place in her own bedroom, the facts support a scoring of 15 points because the bedroom was a place where others were less likely to see Bickham engaging in his criminal behavior.¹⁵ Therefore, we affirm the trial court's scoring of 15 points on OV 8.

D. Departure

A sentencing court departing from the guidelines must state on the record its reasons for the departure and may deviate for only a "substantial and compelling reason"¹⁶

In this case, the sentencing guidelines recommended a minimum term range of 171 to 185 months' imprisonment for Bickham's conviction of CSC I, but the trial court, without explanation, imposed a sentence of life. In light of the lack of explanation, Bickham argues that remand is proper and asks that it take place before a different judge. The prosecutor confesses error in this respect and agrees that remand is proper, but he argues that there is no need to turn the matter over to a different judge.

We find that remand is necessary to allow the trial court to properly articulate support for its departure decision. But we decline to order that a new judge preside over the proceedings on remand. Bickham asks for a different judge on remand in the relief-requested part of his brief on appeal, but nowhere presents argument why the original judge should not stay with the case. "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim."¹⁷

¹¹ *Cannon*, 481 Mich at 162; *Steele*, 283 Mich App at 492.

¹² MCL 777.38(1)(a).

¹³ *Steele*, 283 Mich App at 490.

¹⁴ *Id.*

¹⁵ See *id.* at 491.

¹⁶ MCL 769.34(3). See also *People v Babcock*, 469 Mich 247, 255-256, 272; 666 NW2d 231 (2003).

¹⁷ *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000).

We vacate Bickham's sentence for CSC I and remand this case to the trial court for further proceedings. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ William C. Whitbeck